IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SAVE COLUMBIA CU COMMITTEE; CATHRYN CHUDY; KATHRYN EDGECOMB; LLOYD MARBET; and ROBERT TICE, Appellants, v. COLUMBIA COMMUNITY CREDIT UNION; and STATE OF WASHINGTON DEPARTMENT OF FINANCIAL INSTITUTIONS, Respondents.	No. 37272-0-II OPINION PUBLISHED IN PART

Penoyar, A.C.J. — Five expelled members of Columbia Community Credit Union (Columbia) filed suit against Columbia's board of directors, seeking a declaratory judgment that they were wrongfully expelled. They also sued the Washington State Department of Financial Institutions (DFI) for failing to pursue an enforcement action against Columbia to prevent their expulsions. The trial court dismissed all claims on either CR 12(b)(6) grounds or on summary judgment. We affirm the trial court's dismissal.

FACTS

I. Background

Columbia is a state-chartered credit union under chapter 31.12 RCW. Columbia is governed by the Washington Credit Union Act (WCUA) and regulated primarily by the Washington State Department of Financial Institutions, Division of Credit Unions (DCU). Appellants Cathryn Chudy and Kathryn Edgecomb were members of Columbia's board of

directors until 2006. Appellant Lloyd Marbet served on Columbia's supervisory committee until 2006.[1] Appellant Robert Tice was a member of Columbia. All appellants were members of Save Columbia CU Committee (Save CCU), a nonprofit corporation formed by Columbia members who opposed Columbia's proposed conversion into a mutual savings bank. Save CCU was also a member of Columbia.

In recent years, disagreement arose between Columbia's nine member board on issues of corporate governance. Much of the disagreement arose concerning Columbia's desired conversion into a mutual savings bank. On March 16, 2004, Save CCU, Tice, and several other Columbia members sued Columbia because of governance issues. On May 14, 2006, Save CCU placed an ad in *The Columbian*, Vancouver's daily newspaper, urging readers to run for election to Columbia's board of directors and supervisory committee. The ad arguably disparaged Columbia's existing board.[2]

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[1] Those elected to office in Columbia, either on the board or the supervisory committee, are called volunteers.

[2] The ad read, in part:

> In an attempt to control the outcome of the upcoming election, Columbia's majority Board of Directors has removed key Bylaw provisions within the last several months; namely, those provisions requiring impartial elections and voter's pamphlet statements. These changes significantly alter Columbia's election process. Unlike elections held in 2004 and 2005, candidate statements are not permitted in Columbia's 2006 voters' pamphlet.
>
> DENYING CREDIT UNION MEMBERS THE OPPORTUNITY TO USE CANDIDATE STATEMENTS IN MAKING INFORMED DECISIONS WHEN THEY VOTE IS AGAINST THE PRINCIPLES OF DEMOCRACY.
>
> AN ELECTION IS MORE THAN JUST NAMES ON A BALLOT. IT SHOULD PROVIDE FOR CANDIDATES' POSITIONS ON THE ISSUES AND THEIR VISION FOR THE FUTURE.
>
> If you agree with Save CCU, please make a difference and run for a Board or Supervisory Committee position at Columbia Credit Union. Application packets

II. July 22, 2006, Special Membership Meeting

In late June 2006, the four member supervisory committee voted, under RCW 31.12.195(1), to call a special membership meeting to vote on three questions related to the election.[3] Two days before the membership meeting, Columbia's board (Board) met and amended several of Columbia's bylaws. A majority of the Board voted to provide that at special membership meetings, any procedural rules the Board adopts, supersede *Roberts Rules of Order*. The Board then adopted rules for the special meeting permitting members to arrive at the meeting site anytime before 3:00 p.m. to cast a ballot on the questions.[4]

Notices for the July 22, 2006 meeting were sent to members on or about July 10, 2006, so the extension of voting time the Board approved on July 20 was not disseminated to all Columbia members. Ultimately, the majority vote, for all three questions, was "no." Clerk's Papers (CP) at 11.

Save CCU's counsel, and Chudy, wrote to DFI to complain about the Board's change of bylaws two days before the July 22 membership meeting. DFI's DCU director, Linda Jekel, responded, by letter, that after reviewing the WCUA and Columbia's bylaws, "[t]he changes to the bylaws appear appropriate and reasonable to the circumstances of this Special Meeting and

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> are available at any Columbia Credit Union branch and must be returned by May 22, 2006.

Clerk's Papers (CP) at 9.

[3] In short, the questions were: (1) Should candidates be permitted to submit 500 word statements? (2) Should Columbia be prohibited from endorsing and promoting candidates? (3) Should Columbia officials be prohibited from expending Columbia's funds to promote their preferred candidates?

[4] The special membership meeting was scheduled to begin at 10:00 a.m. on July 22, 2006. Apparently, allowing voting until 3:00 p.m. was an extension of the original voting time.

well within the authority of the Board." CP at 105.

III. Initial Expulsion From Membership

At a special board meeting on August 15, 2006, the majority of the Board amended its bylaws defining "for cause," used when determining whether a member should be expelled. CP at 12. The amended definition allowed for a member's immediate "for cause" expulsion from Columbia for "any other reason which in the opinion of the Board members voting for the expulsion agree is inimical to the best interests of the Credit Union." CP at 12.

Next, the Board expelled two board members, Chudy and Edgecomb, and supervisory committee member Marbet, from membership in Columbia "for cause." The notices of expulsion for each plaintiff detailed specific reasons for the expulsion. The basis for the "inimical-to-Columbia" finding in the Appellants' expulsion notices were Save CCU's placement of the newspaper advertisement, the supervisory committee's calling of a special meeting, and the 2004 lawsuit. Additionally, the Board found that Appellants breached their duty of loyalty and caused Columbia to suffer a loss by engaging in such conduct and by causing or contributing to member withdrawals. Because membership is a requirement for holding elective office, on both the board and the supervisory committee, appellants were removed from those volunteer positions when expelled from membership.

Appellants commenced this action against Columbia and DFI on September 8, 2006, for wrongful expulsion and failure to bring an enforcement action against Columbia. Appellants sought a preliminary injunction to restore Chudy, Edgecomb, and Marbet to their various offices and to restore Tice and Save CCU as members. After hearing oral argument, the trial court entered an order, on October 5, 2006, granting a preliminary injunction in which it restored

Chudy, Edgecomb, and Marbet to membership and to their various elective offices within Columbia.

The trial court found that Columbia's board improperly expelled Chudy, Edgecomb, and Marbet because elected officials cannot be removed from their positions for the same "for cause" as used when expelling members. The trial court noted, however, that the Board could still expel the three from membership, but only if it first suspended their elective office under RCW 31.12.285.[5] All three immediately resumed their former volunteer positions.

IV. Second Expulsion Proceedings

On October 16, 2006, in response to the trial court order, the Board voted to suspend Chudy and Edgecomb from the board and to suspend Marbet from the supervisory committee. Accordingly, the Board scheduled a special membership meeting for November 15, 2006, to vote on whether the members should direct the Board to expel Chudy, Edgecomb, and Marbet from membership.

At the special membership meeting, Columbia members cast approximately 1,200 ballots. Approximately 900 of those ballots were marked to remove Chudy, Edgecomb, and Marbet from elective office and expel them from membership.

[5] RCW 31.12.285 states:

> The board may suspend for cause a member of the board or a member of the supervisory committee until a membership meeting is held. The membership meeting must be held within thirty days after the suspension. The members attending the meeting shall vote whether to remove a suspended party. For purposes of this section, "cause" includes demonstrated financial irresponsibility, a breach of fiduciary duty to the credit union, or activities which, in the judgment of the board, threaten the safety and soundness of the credit union.

V. Trial Court Dismissal of Claims

On February 20, 2007, Columbia moved for summary judgment on the grounds, among others, Chudy, Edgecomb, and Marbet's claims were moot because Columbia's members properly expelled them and because Save CCU and Tice had failed to state a claim for relief.[6] DFI moved for summary judgment, arguing that appellants had failed to state allegations sufficient to constitute arbitrary and capricious action on its behalf.

At a subsequent hearing on April 6, 2007, the trial court dismissed the action against DFI, finding that appellant's allegations were insufficient to constitute arbitrary and capricious action as DFI had no duty to bring enforcement actions against Columbia for any of the special meetings or the appellant's expulsion. At the same hearing, the trial court deferred its decision on Columbia's motion and allowed appellants an opportunity to prepare a one page explanation describing the legal basis for their claim.[7]

The trial court eventually denied Columbia's motion on June 19, 2007, and permitted appellants to amend their complaint to allege the wrongfulness of Columbia's actions taken against them in October and November 2006. One month later, on July 20, Columbia filed a motion to dismiss all claims under CR 12(b)(6) for failing to state a claim on which relief could be granted or, alternatively, for summary judgment on all issues. Additionally, Columbia urged the

[6] Appellants' claims revolved around their alleged wrongful expulsion as Columbia's members.

[7] When the trial court asked what was the legal basis, specifically, for their lawsuit, appellants' counsel replied, "egregious unfairness." Report of Proceedings (RP) (Apr. 6, 2007) at 60. When the trial court pointed out that "there is no cause of action for egregious unfairness," counsel insisted that "egregious unfairness is unlawful." RP (Apr. 6, 2007) at 60. After much colloquy, the trial court asked counsel to prepare a one-page pleading containing the specific cause of action.

trial court to dismiss the claims of wrongful suspension and removal from office, arguing that (1) Chudy and Edgecomb failed to join necessary parties, and (2) Marbet's claim was moot because his term in office would have expired after Columbia's 2006 annual membership meeting. On December 20, 2007, the trial court granted Columbia's motion for summary judgment and motion to dismiss on the issue of appellants' wrongful suspension and expulsion and its motion to dismiss for issues related to the July and November 2006 special membership meetings.

Chudy, Edgecomb, Marbet, Tice, and Save CCU appeal the trial court's orders dismissing their claims against DFI and Columbia.

ANALYSIS

I. Wrongful Suspension and Removal Claims of Chudy, Edgecomb, and Marbet

Chudy, Edgecomb, and Marbet argue that Columbia did not have statutory "cause" to suspend them from their elective office, which led to the membership meeting where they were expelled from their elective offices and membership. Columbia asserts the trial court correctly granted summary judgment. We affirm the trial court's decision.

We review summary judgment orders de novo, engaging in the same inquiry as the trial court, by viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 46-47, 169 P.3d 473 (2007); *Jones v. Pers. Res. Bd.*, 134 Wn. App. 560, 566, 140 P.3d 636 (2006). "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Stevens*, 162 Wn.2d at 47 (quoting *Cerrillo v. Esparza*, 158 Wn.2d 194, 200, 142 P.3d 155 (2006)).

The Board suspended appellants on the bases recited in the original expulsion notices sent in August 2006. Namely, the Board determined that Chudy and Edgecomb breached their duty of loyalty to Columbia by (1) failing to raise Save CCU's concerns of Columbia at a Save CCU meeting where Save CCU decided to publish the "misleading, disparaging" advertisement in *The Columbian*; and (2) causing damage to the "goodwill and reputation" of Columbia by causing a lawsuit to be filed against Columbia seeking access to documents the Board, DFI, and independent counsel had previously determined they could not have access to. CP at 120. Further, the Board found that Chudy and Edgecomb engaged in (3) conduct "inimical" to Columbia's best interest through "unreasonably disruptive" behavior and by "fostering divisiveness" among Columbia volunteers and members. CP at 121. Finally, the Board found that each had (4) "caused Columbia to suffer a loss in that by engaging in the foregoing [they have] caused or contributed to member withdrawals from the credit union." CP at 121.

The Board also suspended Marbet on bases discussed in his August expulsion notice. In addition to items (1), (3), and (4) we mentioned in the preceding paragraph, the Board determined that Marbet acted "contrary to law and caused Columbia to suffer a loss by inducing and causing the Supervisory Committee to demand a Special meeting of members" (1) on a matter that the Board had made an informed decision about; (2) wrongly implying in its call to members that the safety and soundness of the credit union was at stake; and (3) calling the meeting without first attempting to resolve the issues through other means, such as consulting with the Board. The Board further found that Marbet improperly induced and caused the Supervisory Committee to "play a role not proper or appropriate" for the Supervisory Committee to play. CP at 133. On

this issue, there are no genuine issues of material fact. The parties disagree on whether the reasons given for suspension satisfy the statutory requirement for "cause," as outlined in RCW 31.12.285. Because this is a question of law, not fact, this was an appropriate question for the trial court and also for us.

Under RCW 31.12.285:

> The board may suspend for cause a member of the board or a member of the supervisory committee until a membership meeting is held. The membership meeting must be held within thirty days after the suspension. The members attending the meeting shall vote whether to remove a suspended party. For purposes of this section, "cause" includes demonstrated financial irresponsibility, a breach of fiduciary duty to the credit union, or activities which, in the judgment of the board, threaten the safety and soundness of the credit union.

Appellants argue that the reasons the Board gave for suspending appellants were not "cause" under RCW 31.12.285. Specifically, they argue that the reasons listed in the notice of expulsion were clearly not "financial irresponsibility" or a threat to "safety and soundness" and that the facts do not support the only reason given: "breach of fiduciary duty." Appellant's Br. at 21. This argument ignores that the statutory definition of "unsafe or unsound condition" is not exclusive.[8] More importantly, this argument ignores that "cause" as listed in RCW 31.12.285 is within the Board's discretion as the statute contains a list of reasons that are expressly non-exclusive ("includes"). The Board was free to denominate other "cause" for expulsion and we

[8] An "unsafe or unsound condition" "means but is not limited to" where (1) the credit union is insolvent, (2) the credit union has incurred or is likely to incur losses that will deplete all or much of its net worth, and (3) if the credit union is in imminent danger of losing its share and deposit insurance or guarantee. RCW 31.12.005(23). An "unsafe or unsound practice" means any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the likely consequence of which, if continued, would be abnormal risk of loss or danger to a credit union, its members, or an organization insuring or guaranteeing its shares and deposits. RCW 31.12.005(24).

will not substitute our judgment for the Board's in determining whether "cause" as defined and found by the Board was an appropriate reason for expulsion where, as here, the definition of "cause" and the findings the Board approved appear rationally related to legitimate credit union interests, such as retention of members.

Appellants do not challenge the truthfulness of the reasons given for expulsion and so we take them as true. Under the nonexclusive list of reasons for suspension "for cause," any and all of the reasons given for appellants' suspension are sufficient under the law. The Board acted within the scope of its authority. Even taking the facts in the light most favorable to appellants, there is no genuine issue of material fact and Columbia is entitled to judgment as a matter of law. We affirm the trial court's ruling.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. Expulsion of Save CCU and Tice Lawful

The parties agree that a credit union cannot expel a member without cause. RCW 31.12.255(1)(d), however, permits the credit union board to "[e]stablish the conditions under which a member may be expelled for cause." Columbia's board established a number of conditions under which a member may be expelled "for cause," including: (1) any abusive or threatening conduct to a Credit union official or employee; (2) any unlawful conduct or activity affecting the Credit Union; (3) failing to comply with the member's duties; (4) causing the credit union a loss; (5) failing to maintain the member's share balance required; and (6) "[w]ithout

limitation on the foregoing, any other reason which in the opinion of the Board members voting in favor of expulsion agree is inimical to the best interests of the Credit Union."[9] CP at 23.

In the expulsion notices, Columbia details a number of specific reasons for expelling Tice and Save CCU. Tice was expelled for (1) causing Columbia to "incur a loss" by making "frequent frivolous or unreasonable demands," (2) failing to "comply with his duty as a member to act civilly in his dealings with corporate officers and employees of Columbia," (3) causing damage to "Columbia's goodwill and reputation," and (4) causing Columbia to suffer a loss in that by "engaging in the foregoing he has caused or contributed to member withdrawals" from Columbia. CP at 136. As part of Columbia's bylaws, each of the reasons listed above is sufficient in itself for expulsion. Similarly, the Board expelled Save CCU for reasons number (3) and (4) above. Tice and Save CCU reason that "the primary reason" for their expulsion was the newspaper ad and do not assign error to any of these other reasons for expulsion.

We review an order granting a motion under CR 12(b)(6) de novo. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). In assessing factual allegations, "the plaintiff's allegations are presumed to be true." *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). Generally, CR 12(b)(6) motions are granted sparingly and only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).[10] "Any

[9] This is a partial list.

[10] Columbia encourages us to adopt the standard for the federal equivalent of CR 12(b)(6) recently announced in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 355, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This new federal standard was recently rejected by Division I of this Court in *McCurry v. Chevy Chase Bank, FSB*, which correctly noted that "once the state Supreme Court decides an issue with respect to a state court rule, that interpretation is binding on all lower courts

hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." [11] *Save Columbia Credit Union Comm. v. Columbia Comty. Credit Union*, 134 Wn. App. 175, 189, 139 P.3d 386 (2006) (quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)).

Under the expulsion notices, both Tice and Save CCU were expelled from Columbia for a variety of reasons. They do not allege that those reasons are insufficient or even untrue. Because Columbia's bylaws state that each of the reasons listed is sufficient for expulsion from membership, and appellants did not challenge those reasons, we affirm the trial court's dismissal of their claim.

III. Chudy's, Edgecomb's, and Marbet's Claim are Not Moot

At oral argument on October 12, 2007, the trial court dismissed Marbet's claims, via summary judgment, against Columbia on the basis that they became moot at the time his elective office expired. The trial court stated that because his position as a supervisory committee member expired, there was "no relief this court can afford to him that will be meaningful." RP (Oct. 12, 2007) at 21. Marbet argues that the trial court erred. On appeal, Columbia urges us to affirm the trial court's decision and to dismiss Chudy and Edgecomb's appeal as well, as their elected terms

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until it is overruled by the state Supreme Court." 144 Wn. App. 900, 904, 193 P.3d 155 (2008) (citing *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)). We agree with Division I and reject *Twombly* until the state Supreme Court specifically holds otherwise.

[11] Appellant's focus on the statement that "the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived," not whether specific facts are explained in detail in the complaint. Appellant's Br. at 17 (citing *Bravo*, 125 Wn.2d at 750). Columbia properly completes the *Bravo* court's reasoning, however, that though a court may consider a "hypothetical situation" in conjunction with a motion to dismiss under CR 12(b)(6), such a situation must actually be *raised*. *Bravo*, 125 Wn.2d at 750.

have now expired.

We do not view these claims as moot. At a minimum, they relate to the appellants' reputation and the lawfulness of the Board's actions and Columbia does not dispute that appellants continue to be barred from membership. Accordingly, the court can provide appellants the relief they seek, and their claim should not be dismissed as moot. Because we affirm the trial court's dismissal of this case on other grounds, this issue itself is moot. If we had reversed, however, their reputation damage claim could have proceeded despite the expiration of their elected terms.

IV. July 22, 2006 Special Meeting Lawfully Conducted

Appellants devote one page of their briefing to the issue of alleged irregularities of the July 22, 2006 special membership meeting and do not properly brief this issue. RAP 10.3(a)(6), requires that briefs must contain argument "in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Appellants' argument contains no citations to legal authority and does not explain why the July 22 meeting was unlawful. Appellants made arguments at the trial court on this issue, but they have failed to properly make such arguments here. Accordingly, we decline to review this issue on appeal.

V. November 15, 2006 Special Meeting Lawfully Conducted

In their first amended complaint, appellants requested a declaratory judgment from the trial court that:

> The conduct by Columbia of its costly and false publicity campaign for the purpose of causing its members to vote "no" on the questions presented for the special membership meeting on November 15, 2006, including whether to remove from office and expel from membership Chudy, Edgecomb, and Marbet, was contrary to applicable principles of corporate governance and was unlawful.

CP at 597.

The amended complaint contained the allegation that before the special membership meeting on November 15, 2006, "Columbia undertook an extraordinary and costly publicity campaign directed at Columbia's full membership to falsely denigrate and malign" the appellants. CP at 596. Appellants further noted that members were not permitted to vote by mail, rather, they were required to be present at the membership meeting to cast a ballot. Columbia did not require those voting, however, to listen to all presenters. CP at 596. At the November 15, 2006 meeting, of the 1,200 votes, 900 ballots were marked in favor of expelling Chudy, Edgecomb, and Marbet from membership. Appellants urged the trial court to declare "void" all actions taken at this meeting. CP at 598.

Before the trial court, Columbia effectively argued that appellants failed to state a claim for relief with respect to the alleged unlawfulness of the November 2006 membership meeting. For clarification purposes, the trial court permitted appellants to submit a two-page statement detailing their allegations regarding the special membership meetings. Neither the two-page statement, nor the attached six-page narrative regarding the history of credit unions in Washington State, provided any other significant facts about the meetings or clarified what law or laws Columbia had violated. Accordingly, the trial court granted Columbia's motion to dismiss.

In fact, the information appellants provided does not state a claim for relief. Columbia acted under RCW 31.12.195 rules regarding "special membership meetings," and appellants fail to state facts sufficient to prove otherwise. At the time of the November meeting, Columbia's bylaws did not permit voting by mail at special meetings. Further, nothing in the bylaws requires

those voting at the special membership meeting to listen to all presenters before casting their vote. Appellants may think that the meeting was conducted unfairly, but they fail to specify any unlawful acts related to procedures at the meeting.

Their remaining claim, regarding the November meeting, is that the Board undertook a "costly publicity campaign" designed to "falsely denigrate and malign" the appellants. CP at 596. In their two-page statement of allegations, which the trial court requested, appellants stated that Columbia's campaign referred to them as "offenders" who had "broken the law and been disloyal" to Columbia by participating in the newspaper advertisement, filing a claim for declaratory action, and causing the supervisory committee to unnecessarily call a special meeting of membership.[12] CP at 663. Columbia contends, however, that appellants failed to identify that any statement the Board made in advance of the meeting was false.

Additionally, Columbia notes that even with the factual allegations presented, appellants still fail to explain what law Columbia violated if, in fact, statements were made. Appellants present no information that the Board acted in a way that violated their bylaws, charter, the WCUA, or any other regulation that limits their behavior. Though inexpert pleading is permitted, insufficient pleading is not. *Nw. Line Constructors Chapter of Nat'l Elec. Contractors Ass'n v. Snohomish County Pub. Util. Dist. No. 1*, 104 Wn. App. 842, 848-49, 17 P.3d 1251 (2001). Quite simply, a party cannot defend against allegations where they have not been given sufficient notice of the claim. *Nw. Line Constructors Chapter of Nat'l Elec. Contractors Ass'n*, 104 Wn.

[12] Appellants state that the campaign implied that the trial court recommended "their banishment" as "[a] headline read"—no specifics on what "headline" appellants are referring to—"Judge says Volunteers must be suspended before expelled." CP at 663.

App. at 848-49. Appellants never identified, even when given additional time and direction from the trial court, what law Columbia violated, even assuming the statements made were false.

In granting Columbia's motion, the trial court stated that "[p]laintiffs have gone to great lengths in trying to explain why the conduct of the governance board and the membership vote was unlawful. Even if I were to agree with some of Plaintiffs' criticisms of process, I am unable to find a proper legal basis to permit this lawsuit to proceed." CP at 682. We agree with the trial court's analysis and affirm the dismissal.

VI. Dismissal of Claim Against DFI

Appellants argue that the trial court erred in granting DFI summary judgment on the issue of whether it acted in an arbitrary and capricious manner on two occasions; the July 22, 2006 special membership meeting and the August 15, 2006 special board meeting. DFI argues that the trial court ruled properly, as there is no material issue of fact. We agree with the trial court and DFI.

The trial court found that whether DFI takes enforcement action against a credit union is a matter of discretion and that DFI's actions, in this case, were not arbitrary and capricious.[13] Again, we review summary judgment orders de novo, engaging in the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Stevens*, 162 Wn.2d at 46-47; *Jones*, 134 Wn. App. at 566. Summary judgment is appropriate where there are no genuine issues of material fact and where the moving party is

[13] The order granting summary judgment states that "the bringing of an enforcement action by a state agency, in this case, the [DFI], is a discretionary matter, and the agency does not have a duty to bring an enforcement action. Further, the court finds that the allegations in the complaint are insufficient to constitute arbitrary and capricious action by the Department." CP at 579.

entitled to judgment as a matter of law. *Stevens*, 162 Wn.2d at 47.

The Administrative Procedures Act (APA) provides the "exclusive means" of judicial review of agency action.[14] Within the APA, allowance is made for judicial review of "other agency action" where "[a] person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition . . . seeking an order . . . requiring performance." RCW 34.05.570(4)(b). To compel DFI to undertake enforcement action against Columbia, appellants must establish that DFI failed to undertake a "duty that [it was] required by law to [] perform[]." RCW 34.05.570(4)(b). The appellants fail to do this.

The Credit Union Act gives DFI discretion as to whether to take enforcement action against a credit union: "[t]he director *may* issue and serve a credit union with a written notice of charges and intent to issue a cease and desist order if, in the opinion of the director, the credit union has committed or is about to commit: (1) A material violation of law[15]; or (2) An unsafe

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[14] Subject to several exceptions, none of which are relevant here. See RCW 34.05.510 (1)-(3).

[15] "Material violation of law" is defined as:

> (a) If the credit union or person has violated a material provision of:
> (i) Law;
> (ii) Any cease and desist order issued by the director;
> (iii) Any condition imposed in writing by the director in connection with the approval of any application or other request of the credit union; or
> (iv) Any written agreement entered into with the director;
> (b) If the credit union or person has concealed any of the credit union's books, papers, records, or assets, or refused to submit the credit union's books, papers, records, or affairs for inspection to any examiner of the state or, as appropriate, to any examiner of the national credit union administration; or
> (c) If the person has breached his or her fiduciary duty to the credit union.

RCW 31.12.005(13).

or unsound practice.[16]" RCW 31.12.585 (emphasis added). This provision contains no duty requiring DFI to engage in an enforcement action.

Under RCW 31.12.585, agency "decisions associated with exercising [] enforcement powers are discretionary." *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 31, 978 P.2d 481 (1999). Courts are disinclined to compel an agency to act unless "they have totally failed to exercise their discretion to act, and therefore . . . have acted in an arbitrary and capricious manner." *Nat'l Elec. Contractors Ass'n, Cascade Chapter*, 138 Wn.2d at 32 (quoting *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978)).

DFI's discretion is not absolute. We scrutinize agency action, or inaction, under an "arbitrary or capricious" standard. RCW 34.05.570(4)(c)(iii). DFI's action/inaction is arbitrary and capricious "if it is willful and unreasoning, and taken without consideration and in disregard of the facts and circumstances." *Nat'l Elec. Contractors Ass'n, Cascade Chapter*, 138 Wn.2d at 29. Where there is room for two opinions, and the agency acted honestly and on due consideration, the reviewing court should not find that an action was arbitrary and capricious.[17] *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004).

Evidence in the record as to the July 22, 2006 special membership meeting indicates that

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[16] "Unsafe or unsound practice" is defined as:

> any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the likely consequences of which, if continued, would be abnormal risk of loss or danger to a credit union, its member, or an organization insuring or guaranteeing its shares and deposits.

RCW 31.12.005(24).

[17] Judicial intervention is limited, however. When reviewing matters within agency discretion, the court's function is merely to verify that an agency has used its discretion in accordance with law. RCW 34.05.574(1).

DFI director, Linda Jekel, carefully considered the situation before declining to take enforcement action. In a July 21, 2006 letter to Chudy, Jekel explained that after reviewing the information provided, Columbia bylaws and RCW 31.12.195, the changes made to the "bylaws appear appropriate and reasonable to the circumstances of [the] Special Meeting and well within the authority of the Board." CP at 105. Appellants may have a difference of opinion with Jekel, but a difference of opinion does not prove arbitrary and capricious action. There is no genuine issue of material fact in this matter.

Jekel carefully considered the August 15, 2006 meeting as well. She explains in her declaration that after being asked to stop the removal of the elected officials and member expulsions, she reviewed the CUA and consulted with DFI's Assistant Attorney General. After taking those actions, Jekel determined that the "Board's actions did not appear to violate [CUA], [and that she did] not believe that [DFI] had authority to take action to prevent the members from being expelled." CP at 408.

In both instances, DFI provided information to the trial court to show that their actions were reasoned and that they considered the attendant facts and circumstances. Appellants' brief—and the record—contain no evidence that creates a genuine issue of material fact on these issues. We affirm the trial court's grant of summary judgment to DFI on both matters.

VII. Improper Motive

Appellants allege that "DFI's inaction is improperly based in part upon a close friendship between career officials in DFI's DCU and Columbia's CEO, Parker Cann, who recently directed DCU." CP at 14. Jekel denied that allegation, noting that Cann had nothing to do with her

appointment as Division Director. Appellants provided nothing to the contrary besides argumentative assertions and speculation.

Appellants argue that we can find an agency action arbitrary and capricious if obtained through "improper motives[] or collusion," citing the dissent of a recent Washington Supreme Court case, *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 437, 128 P.3d 588 (2006). Appellant's Br. at 36. As DFI notes, this proposition sets forth the standard of review for agency action when that agency decides to take property through the power of eminent domain. The Supreme Court did not imply that the standard set forth in *Central Puget Sound Regional Transit Authority* applies to agency action not involved in eminent domain proceedings. 156 Wn.2d at 436.

Even if we were bound by the standard appellants suggest, they still must provide more than "speculation, argumentative assertions that unresolved factual issues remain . . . ." to create a genuine issue of material fact on the issues presented. *Plemmons v. Pierce County*, 134 Wn. App. 449, 455-56, 140 P.3d 601 (2006).

We affirm the trial court's dismissal.

Penoyar, A.C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.